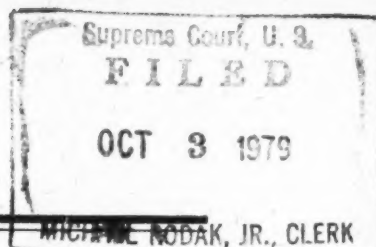


No. 79-224



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**In the Supreme Court of the United States**

OCTOBER TERM, 1979

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**MICHAEL E. COLEMAN, PETITIONER**

v.

**GEORGE DARDEN, ET AL.**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE TENTH CIRCUIT**

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**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. B) is reported at 595 F. 2d 533. The opinions of the district court (Pet. Apps. C, D) are not reported.

**JURISDICTION**

The judgment of the court of appeals (Pet. App. A) was entered on February 23, 1979. A timely petition for rehearing was denied on May 19, 1979. The petition for a writ of certiorari was filed on August 10, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

**QUESTIONS PRESENTED**

1. Whether 29 U.S.C. 791(b) or 5 C.F.R. 713.401 imply a private cause of action against federal agencies to redress alleged physical handicap discrimination in employment.

(1)

2. Whether the court of appeals failed to consider petitioner's claim that he was denied employment by a federal agency in violation of non-discrimination requirements.

3. Whether the refusal to hire petitioner violated the Fifth Amendment.

#### STATEMENT

Petitioner has been totally blind since 1960. While he was attending law school in 1974, petitioner was employed as a part-time case analyst in the Denver office of the Equal Employment Opportunity Commission. After he received his law degree, petitioner was promoted to the position of law clerk on January 1, 1975. The duties of this position included drafting opinion letters interpreting Title VII of the Civil Rights Act of 1964, reviewing EEOC contracts, providing legal advice and assistance in the preparation of briefs, and drafting administrative regulations and examining other regulations for conformance with Title VII. In performing this job, petitioner had the assistance of a reader (Pet. App. 5a-7a).

Petitioner was terminated from his job as law clerk on March 1, 1976, because he failed to pass the bar examination which was a requirement for his continued employment. In anticipation of his termination, petitioner applied for the different position of research analyst at the Denver office of the EEOC. The duties of a research analyst include gathering and analyzing statistical and socio-economic data, developing work sheets for compiling statistical data, interpreting computer formats and printouts, compiling comparative labor force data, assisting in the preparation of materials for discovery, and reviewing and preparing materials to aid attorneys in litigating cases (Pet. App. 6a-7a).

Petitioner's application for this position was one of seven applications referred to the Denver office by the Commission's personnel office for final selection. Respondents Annie Clay and John Ford, who reviewed the application, did not select petitioner as one of the three finalists for the job. Ms. Clay, who was familiar with petitioner's work at the Commission, stated that it was her judgment "that the duties of the Research Analyst, GS-11, position, could not be performed by a person handicapped through blindness, but would rather be performed by a second employee if the blind person was hired" (Pet. App. 55a).

Petitioner thereafter filed a grievance with the Commission, which was rejected. He then filed this suit, alleging that the Commission's decision not to hire him as a research analyst was improperly based on his handicap, in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and the Due Process Clause of the Fifth Amendment.

The district court held that the Rehabilitation Act of 1973 did not create an implied private right of action against federal agencies for claims of handicap discrimination (Pet. App. 24a). The court also held that, on the undisputed facts of this case, the Commission's actions did not violate the Fifth Amendment (Pet. App. 29a-30a):

It is not arbitrary or capricious for a government agency to establish physical requirements which are job related and there can be no question here that sufficient visual acuity to enable the employee to read has a direct relationship to the job of assisting lawyers in the preparation of evidence and data in discrimination investigations.

The court of appeals affirmed. The court held that the Commission did not deny due process to petitioner by



creating an irrebuttable presumption that he could not perform the research analyst job because of his handicap (Pet. App. 13a):

Whenever a person seeking employment is rejected on the basis of an application, there is necessarily a "presumption" that he would be unable to perform the job as satisfactorily as the person hired. Such an unsuccessful applicant could always contend that he should be permitted an opportunity to prove that he could adequately perform the job, despite his apparent lack of qualifications. Merely because such "presumptions" are a fact of business life does not mean that "trial periods" should be required for all, or even all handicapped applicants, and certainly not if an applicant's qualifications are individually considered in relation to legitimate job requirements. The undisputed evidence in this case is that Coleman was given such individual consideration.

The court also held that a private cause of action could not be implied against federal agencies under Section 504 of the Rehabilitation Act of 1973, because Section 504 applies only to a "program or activity receiving Federal financial assistance" (29 U.S.C. 794), and thus does not apply to federal agencies (Pet. App. 16a).

The court of appeals concluded, however, that petitioner had a cause of action under the Administrative Procedure Act to review the Commission's employment decision.<sup>1</sup> The court held that, on the undisputed facts of this case, the Commission's decision to hire an applicant other than petitioner was not arbitrary or capricious (Pet. App. 16a-17a).

<sup>1</sup>The Commission did not argue in the court of appeals that employment decisions are not "agency action" subject to judicial review under 5 U.S.C. 702.

## ARGUMENT

1. Petitioner contends (Pet. 7-15) that the court of appeals erred in failing to find a cause of action implied against federal agencies for discrimination on the basis of physical handicap in violation of Section 501(b) of the Rehabilitation Act of 1973, 29 U.S.C. 791(b),<sup>2</sup> or in violation of 5 C.F.R. 713.401(a).<sup>3</sup> This contention was not

<sup>2</sup>Section 501(b) of the Rehabilitation Act of 1973, 29 U.S.C. 791(b), provides:

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Civil Service Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for handicapped individuals.

<sup>3</sup>5 C.F.R. 713.401(a) provides:

In determining the merit and fitness of a person for competitive appointment or appointment by noncompetitive action to a position in the competitive service, an appointing officer shall not discriminate \* \* \* on the basis of a physical handicap with respect to any position the duties of which may be efficiently performed by a person with the physical handicap.

This regulation was promulgated under 5 U.S.C. 7153, which provides:

The President may prescribe rules which shall prohibit, as nearly as conditions of good administration warrant, discrimination because of physical handicap in an Executive agency or in the competitive service with respect to a position the duties of which, in the opinion of the Civil Service Commission, can be performed efficiently by an individual with a physical handicap, except that the employment may not endanger the health or safety of the individual or others.

raised by petitioner in the court of appeals and is therefore not properly presented for further review. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In the court of appeals, petitioner argued that the Rehabilitation Act generally—and Section 504 of the Act in particular—created a private cause of action to redress violations of its prohibitions. Although Section 501(b) of the Act was referred to at several points in petitioner's brief in the court of appeals (Br. 10, 11), these references were made in support of its contention in that court that a cause of action was created by Section 504 (see Br. 10-20). The court of appeals correctly addressed and rejected the latter claim, noting that Section 504 has no application to federal agencies because they are not recipients of "Federal financial assistance," 29 U.S.C. 794 (Pet. App. 16a).<sup>4</sup> The court did not consider any claim that a private action against federal agencies exists under Section 501(b) or under 5 C.F.R. 713.401(a) because no such contention was presented in that court.<sup>5</sup>

<sup>4</sup>Petitioner has not challenged this ruling of the court of appeals.

<sup>5</sup>Even if an action were implied under Section 501(b) or 5 C.F.R. 713.401(a), it is apparent from the record in this case that no violation of these provisions could be proven. The statute directs the agency to adopt "an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals," 29 U.S.C. 791(b). Nothing in petitioner's individual grievance suggests that the agency has not complied with this statutory requirement. Similarly, the regulation directs agencies not to discriminate on the basis of physical handicap "with respect to any position the duties of which may be efficiently performed by a person with the physical handicap," 5 C.F.R. 713.401(a). As the court of appeals observed (Pet. App. 20a), the Commission has

provided readers for visually handicapped persons in the positions of law clerk and staff attorney, who have specialized training and skills not possessed by the ordinary reader, but [has]

Moreover, as petitioner concedes (Pet. 7 n.1), the question whether Section 504 creates a cause of action against federal agencies for pre-1978 handicap discrimination lacks prospective significance. Section 504 of the Act was amended in 1978 to encompass activities of "any Executive agency" as well as activities of recipients of "Federal financial assistance." Section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955, 2982. The question whether this amendment to Section 504 creates a cause of action for post-1978 federal handicap discrimination is not presented in this case (see Pet. 7 n.1).

2. Petitioner contends (Pet. 20-24) that the court of appeals applied an erroneous legal standard in reviewing the Commission's employment decision under the Administrative Procedure Act. The court of appeals held that the agency's action was valid because, on the undisputed facts, it was not "arbitrary or capricious," 5 U.S.C. 706(2)(A). See *McNutt v. Hill*, 426 F. Supp. 990 (D.D.C. 1977). Petitioner does not dispute this conclusion, but contends instead that the agency's action was "in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. 702(2)(C), and therefore invalid. In this regard, petitioner claims that the Commission's decision conflicted with a duty allegedly imposed by Section 501(b) of

concluded that in the case of a research analyst, the duties would be performed by the reader and not by the visually handicapped person. (R. 116)[.] That conclusion seems reasonable in light of the announced duties of the position.

Because petitioner cannot "efficiently perfor[m]" (5 C.F.R. 713.401(a)) the duties of the position for which he applied, the Commission's refusal to appoint him to that position did not breach the regulation.



the Rehabilitation Act of 1973 and 5 C.F.R. 713.401(a) (see note 5, *supra*) not to discriminate on the basis of physical handicap.

But in concluding that the Commission's action was not arbitrary or capricious, the court emphasized the very factors that refute petitioner's contention that the statute and regulation were violated (see note 5, *supra*). While the Commission has a responsibility to employ handicapped individuals for jobs which they can perform, it has no obligation to hire persons that cannot "efficiently perform" (5 C.F.R. 713.401(a)) the requirements of a position. For the reasons amply set forth by the court of appeals (Pet. App. 18a-21a), the agency was not required to hire an additional person to provide reading assistance to petitioner to comply with either the statute or the regulation (see note 5, *supra*). Cf. *Southeastern Community College v. Davis*, No. 78-711 (June 11, 1979).

3. Petitioner also argues (Pet. 15-20) that the Commission impermissibly utilized an "irrebuttable presumption" to deny him employment because of his handicap. This contention was properly rejected by the court of appeals (Pet. App. 9a-15a).

The Commission's decision not to hire petitioner was not based on an irrebuttable presumption. It was instead based on a consideration of petitioner's, and other applicants', qualifications for the competitive position for which they sought employment. Unlike *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974)—on which petitioner relies (Pet. 17)—the Commission has no general policy that operates to exclude a class of persons from employment. To the contrary, as the court of appeals observed (Pet. App. 13a), the undisputed evidence in this case reveals that petitioner's application was given

"individual consideration" in relation "to legitimate job requirements" (*ibid.*) and was not excluded from consideration because of his handicap.<sup>6</sup>

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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<sup>6</sup>Petitioner argues (Pet. 18) that the court of appeals erred in suggesting that the irrebuttable presumption doctrine extends only to fundamental constitutional claims and "might" be inapplicable to handicap discrimination (Pet. App. 12a). Because the court concluded that the Commission's action was *not* based on an irrebuttable presumption, the dicta concerning the possible inapplicability of the doctrine in the context of handicap discrimination affords no basis for further review in this court. Cf. *Broadrick v. Oklahoma*, 413 U.S. 601, 609 n.9 (1973).